

NO. 47235-0-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

ANTHONY EDWARDS, APPELLANT

**Appeal from the Superior Court of Pierce County
The Honorable Philip Sorenson**

No. 14-1-03898-6

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the defendant fail to preserve his claim or objection to the imposition of legal financial obligations when he failed to object to the issue at the trial court?
2. Has defendant failed to show defense counsel was ineffective for not objecting to the discretionary legal financial obligations when the entirety of the record reveals defendant has failed to meet his burden of showing counsel was ineffective when defense counsel's actions are examined over the course of the entire record?

B. STATEMENT OF THE CASE.

1. Procedure

On October 1, 2014, the Pierce County Prosecutor's Office filed an information, cause number 14-1-03898-6, charging Anthony Edwards ("defendant") with Count I (Stalking), Counts II and III (both Domestic Violence Court Order Violations). CP 1-3. As part of a plea agreement, an amended information was filed charging only Counts II and III. CP 9-10. Defendant pleaded guilty to both counts and was sentenced to 41 months

on each to be served concurrently. CP 20-21, 31; RP 8, 12¹. The court also imposed \$400 of discretionary legal financial obligations (LFOs) towards Department of Assigned Counsel (DAC) recoupment along with \$800 in mandatory LFOs. CP 29; RP 12.

2. Facts

Between September 26th and September 30th, 2014, defendant made repeated attempts to contact his ex-girlfriend in violation of two valid no-contact orders. CP 4. The text messages, emails, and phone calls made by defendant largely focused on his desire to rebuild a relationship or romance with the victim. Defendant sent the victim emails under a false name and, after admitting his identity, asked her to give him a chance to “fix things” and tell her that “I will never stop and I never give up on you.” CP 4. Over the four day period, defendant phoned the victim from a blocked number and sent her close to 100 text messages making similar, unwanted overtures. CP 4-5; RP 9. Defendant was arrested following a police report filed by the victim. CP 4-5. Defendant filed timely appeal. CP 39.

¹ The Verbatim Transcript of Proceedings is contained in four volumes. “Volume 1 of 1” containing the proceedings of 2/11/2015 is herein designated “RP.” All other volumes are denoted by the date of proceeding.

C. ARGUMENT.

1. THE DEFENDANT DID NOT PRESERVE THE ISSUE FOR REVIEW WHERE HE FAILED TO OBJECT TO THE ASSIGNMENT OF LEGAL FINANCIAL OBLIGATIONS.

A failure to object to an issue in the trial court precludes it from being reviewed on appeal. *State v. Blazina*, 174 Wn. App. 906, 911, 301 P.3d 492 (2013); *State v. Guloy*, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985). A defendant may only appeal a non-constitutional issue on the same grounds that he objected on below. *State v. Thetford*, 109 Wn.2d 392, 397, 745 P.2d 496 (1987); *State v. Hettich*, 70 Wn. App. 586, 592, 854 P.2d 1112 (1993). Objecting to an issue promotes judicial efficiency by giving the trial court an opportunity to fix any potential errors, thereby avoiding unnecessary appeals. See *State v. Lindsey*, 177 Wn. App. 233, 247, 311 P.3d 61 (2013).

During sentencing, the defense raised no objection to the sentence. RP 8-13. The defendant had an opportunity to object to the court's imposition of \$400 in discretionary fees, but did not. RP 13-15. Defendant did not preserve the issue for review on appeal.

The appellate court may review issues raised for the first time on appeal only if there is (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, or (3) manifest error

affecting a constitutional right. RAP 2.5(a). *See also State v. Riley*, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993); *State v. Sisouvanh*, 175 Wn.2d 607, 618, 290 P.3d 942 (2012). The defendant would have to claim a manifest error with actual prejudice affecting a constitutional right was present in order to raise it under the RAP 2.5(a) exceptions. *See State v. Lynn*, 67 Wn. App. 339, 345, 835 P.2d 251 (1992); *State v. Gordon*, 172 Wn.2d 671, 676, 260 P.3d 884 (2011).

Only in the event that a defendant proves an error that is both constitutional and manifest does the burden shift to the State to show harmless error. *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). Failing to make an individualized inquiry into a defendant's ability to pay LFOs does not involve a constitutional right. *State v. Blazina*, 182 Wn.2d 827, 840-41, 311 P.3d 492 (2015) (Fairhurst, J., concurring). Defendant has failed to provide any evidence of prejudice required for a manifest constitutional error, so this court should decline to exercise its discretionary RAP 2.5(a) review.

The defendant relies on *Blazina*, 182 Wn.2d 827, to argue that this court should overlook his failure to preserve the issue through a proper objection and grant review under RAP 2.5(a). While the Supreme Court used its discretionary authority under RAP 2.5(a) to reach the merits, they acknowledged unique circumstances led them to exercise their discretion

and “...the Court of Appeals properly declined discretionary review.” *Id.* at 834-35.

In *Blazina*, the Supreme Court did not create a new standard exempting LFO claims from traditional preservation requirements; it explicitly noted “...[the assigned LFO error] will not taint sentencing for similar crimes in the future. The error is unique to these defendants’ circumstances...” *Id.* at 834. The Court reached the merits of the case because of “[n]ational and local cries for reform of broken LFO systems...”, a reason particularly suited to the Supreme Court’s unique ability to address broad policy issues of statewide or national concern.

The Supreme Court did not overrule the Court of Appeals’ denial of review for failure to preserve and explicitly stated that other appellate courts are not obligated to exercise their discretion in the same way. *Id.* at 834-35. This court should decline to exercise such discretion since the defendant has failed to present an argument for why this case demands the court exercise its power of discretionary review under RAP 2.5(a).

If the court does decide to grant review, the appropriate remedy would be to remand to the trial court for an individualized inquiry into the defendant’s ability to pay his discretionary legal financial obligations. *See Blazina*, 182 Wn.2d at 838-9.

2. DEFENDANT HAS FAILED TO SHOW
INEFFECTIVE ASSISTANCE OF COUNSEL
BECAUSE COUNSEL'S REPRESENTATION
WAS OBJECTIVELY REASONABLE AND NO
PREJUDICE RESULTED.

To demonstrate ineffective assistance of counsel, a defendant must show that: (1) defense counsel's representation fell below an objective standard of reasonableness in light of all circumstances, and (2) defense counsel's representation prejudiced the defendant. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995); *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (applying the two-prong “*Strickland* test” from *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). The burden is on the defendant alleging ineffective assistance to show deficient representation under the *Strickland* test based on the record below. *Strickland*, 466 U.S. at 667-68; *McFarland*, 127 Wn.2d at 335; *In re Personal Restraint of Davis*, 152 Wn.2d 647, 673, 101 P.3d 1 (2004) (quoting *Kimmelman v. Morrison*, 477 U.S. 365, 384, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986)). In the instant case, the defendant alleges that defense counsel was ineffective for failing to object to the assignment of LFOs. Brief of Appellant at 1, 10-2.

- a. Defendant has failed to prove that defense counsel's overall performance was deficient.

A defendant's right to effective counsel is met when he is able to "require the prosecution's case to survive the crucible of meaningful adversarial testing." *U.S. v. Cronic*, 466 U.S. 648, 656, 104 S. Ct. 2039, 2045, 80 L. Ed. 2d 657 (1984). The defendant must demonstrate that counsel's unprofessional conduct or the circumstances surrounding his legal representation have deprived him of a fair, adversarial trial. *See Cronic*, 466 U.S. at 658; *U. S. v. Morrison*, 449 U.S. 361, 363, 101 S. Ct. 665, 667, 66 L. Ed. 2d 564 (1981).

The effectiveness of counsel must be judged based on a totality of the legal representation provided by counsel at all phases of the trial. *See Cronic*, 466 U.S. at 659; *See also Avery v. State of Alabama*, 308 U.S. 444, 452, 60 S. Ct. 321, 325, 84 L. Ed. 377 (1940) (evaluating the entirety of defense counsel's performance to be effective, despite alleged errors by defendant); *Chambers v. Maroney*, 399 U.S. 42, 90 S. Ct. 1975, 26 L. Ed. 2d 419 (1970) (holding that a tardy appointment of counsel is not a *per se* denial of effective counsel). Isolated errors by counsel do not justify setting aside a judgement, provided that the trial still adequately served its adversarial purpose. *See id.* at 656-57; *Strickland*, 466 U.S. at 691.

In the instant case, when the record is reviewed as a whole, it is apparent that defendant received effective assistance of counsel as guaranteed by the Sixth Amendment. U.S. Const. amend. VI. Defense counsel requested a mental health evaluation after learning that defendant's mental health may have contributed to his unlawful behavior. RP (1/28/14) 1-4. Defense counsel moved for and received a continuance in order to thoroughly prepare a diminished capacity defense. RP (12/15/14) 2-4. Counsel also obtained a favorable plea agreement for his client in which the State agreed not charge Count I and to recommend concurrent sentences at the lowest end of the standard range on Counts II, III. CP 12-21; RP 8-10.

Even if the court were to consider a failure to object to LFOs an error, it was a single error and does not negate the overwhelming effectiveness of defense counsel throughout the record. The defendant fails to show how counsel's overall trial performance was sufficiently inadequate as to deprive him of a fair and adversarial trial. The defendant's claim does not satisfy the first prong of the *Strickland* test.

- b. Defendant has failed to show prejudice resulting from counsel's decision not to object to LFOs.

The ***Strickland*** test requires the defendant to show the prejudice resulted from counsel's deficient representation to establish a valid ineffective assistance of counsel claim. ***Strickland***, 466 U.S. at 687.

Prejudice means there must be a "plausible showing by the [appellant] that the asserted error had practical and identifiable consequences in the trial of the case." ***State v. Gordon***, 172 Wn.2d 671, 676, 260 P.3d 884 (2011) (quoting ***State v. O'Hara***, 167 Wn.2d 91, 99, 217 P.3d 756 (2009)). The defendant must show that the proceeding would have had a different outcome, but for counsel's deficient representation. ***McFarland***, 127 Wn.2d at 337; *See also Strickland*, 466 U.S. at 687. The failure of a defendant to show either deficient performance or prejudice defeats his claim. ***State v. Emery***, 174 Wn.2d 741, 755, 278 P.3d 653 (2012). The defendant cannot show a different result would have occurred had counsel objected to his discretionary LFOs. Even if he had objected, the decision whether to impose or reduce amount of discretionary LFOs is within a trial court's discretion. The defendant fails to show that the trial court would have made a different decision. As a result, the defendant is unable to show he was prejudiced by the failure to object.

The defendant has failed to show that the totality of defense counsel's conduct was deficient and that any isolated deficient conduct was prejudicial.

D. CONCLUSION.

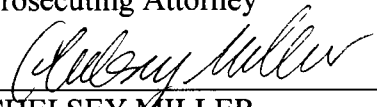
The state respectfully request that the court decline to review the defendant's challenge to legal financial obligations because he failed to preserve the alleged error for review.

Additionally, the court should deny the defendant's claim of ineffective assistance of counsel because defense counsel's overall performance does not rebut the presumption of effective assistance and the

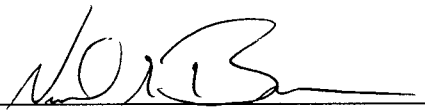
defendant was not prejudiced. The defendant's convictions should be affirmed.

DATED: April 11, 2016.

MARK LINDQUIST
Pierce County
Prosecuting Attorney



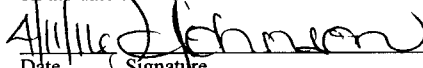
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Date Signature

PIERCE COUNTY PROSECUTOR

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